Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR
CLERK

(3)

No. 85-216

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem for FRANK JOSEPH ROA,
Appellants,

v.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,
Appellees.

On Appeal From
The Supreme Court of California

BRIEF OF AMICUS CURIAE [redacted]

HASSARD, BONNINGTON,
ROGERS & HUBER
Counsel of Record
DAVID E. WILLETT
50 Fremont Street, Suite 3400
San Francisco, CA 94105
(415) 543-6444
Counsel for Amicus Curiae
California Medical
Association

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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BRIEF OF AMICUS CURIAE INCLUDING MOTION TO AFFIRM OR DISMISS

MOTION TO AFFIRM OR DISMISS
INTEREST OF AMICUS CURIAE

There is a unique reason for this appearance by Amicus. Without the participation of Amicus, there would be only one side to the case. This is an appeal by the plaintiffs' attorneys from the trial court's refusal to award them fees which exceed statutory limits. These fees would have been paid from a settlement obtained for a two year old child injured at birth, paid by the defendant physician's insurer. There was no separate representation for the nominal appellants, the child's guardians ad litem. The nominal respondents, defendant physician and his medical group, have no standing to contest this appeal under California law: *Niles v. City of San Rafael* 42 Cal.App.3d 230, 116 Cal.Rptr. 733 (1974). Opposition was confined to amicus presentations, the

first such presentation being contained in the brief filed by this amicus before the California Court of Appeal. Indeed, the California Supreme Court took note of the fact that numerous amicus briefs had been filed, representing competing viewpoints, in discussing standing and the potential conflict of interest between plaintiffs and their attorneys on the issue of fees. Appellants' written consent to the filing of this brief has been secured.

The California Medical Association represents the great majority of physicians in private practice in California, one of the groups particularly affected by the 1975 professional liability insurance crisis which was resolved by the adoption of the Medical Injury Compensation Reform Act ("MICRA"). The various amici who appeared below in this and other "MICRA" cases divided their responsibilities, to avoid duplicative presentations. This amicus has addressed MICRA's practical aspects and consequences. The Jurisdictional Statement is particularly vulnerable to assessment on the basis of reality.

REQUEST FOR SUMMARY AFFIRMANCE OR DISMISSAL

Because of the unique circumstances attending this appeal, amicus curiae California Medical Association moves for summary affirmance of the California Supreme Court's judgment, or in the alternative, the dismissal of this appeal for failure to present a substantial federal question. Should the court not recognize amici for the purpose of such a motion, then we respectfully request that this brief be accepted by the Court as an argument supporting dismissal of the appeal upon the Court's own motion.

STATEMENT OF FACTS

An obvious anomaly which this court might take into account in determining whether this appeal warrants more than summary consideration is the fact that the record below was entirely under the control of Mr. Harlem, the attorney who concluded the settlement, sought the additional fees, and brought this appeal.

Since the record was entirely under the control of appellants' attorneys, this court might be wary of accepting significant con-

clusions founded on scanty foundations. The fact that the record is devoid of any evidence supporting appellants' claim of unconstitutional impediment to the retention of counsel or other alleged abuse also must fall hard on appellants.

We call attention to counsel's personal interest in the outcome of this matter because the jurisdictional statement is crafted to develop the notion that this appeal is being pursued by plaintiffs whose attorneys have only an incidental interest in the outcome. To foster this impression, and to bolster an argument which does not survive scrutiny, Business & Professions Code § 6146 is characterized as a statute which limits the amount "that a malpractice plaintiff may agree to pay to his attorney" or the amount "that malpractice plaintiffs may offer attorneys". While § 6146 undeniably has impact upon the plaintiff, appellants seem reluctant to acknowledge that § 6146 imposes direct limitations upon *attorneys*. If violations occur, it is the attorney who violates the statute. Appellants prefer to stand § 6146 on its head. Appellants' real claim is that the legislature should not be permitted to limit attorneys' fees.

ARGUMENT

THE REAL CONSEQUENCES OF SECTION 6146

Section 6146 establishes a sliding scale which, as the California Supreme Court noted, has frequently been recommended as the preferable form of regulation. One of the consequences of this sliding scale approach is that the injured patient with less than a "blockbuster" case becomes a more attractive client.

However, these are not the only cases affected by § 6146. In other cases, Section 6146 operates to the benefit of both the plaintiff and the defendant by reducing the economic incentive to the plaintiff's attorney to take a case to trial which should be settled. This incentive may exist either because the attorney will receive a larger fee if the case is not settled before trial, or because an appealing plaintiff or catastrophic injury will bring in a blockbuster award, including a seven figure fee, *if* doubtful liability can be surmounted. Defense costs are a significant

professional liability expense. This expense can be reduced if cases which should be settled are settled promptly.

It is extremely significant that the legislature was concerned because so much of the money spent for professional liability insurance is never paid to injured patients. Section 6146 gives the injured patient a greater share of the settlement or award. Despite enactment of § 6146, it is by no means a foregone conclusion that the attorney who actually does the work in securing the settlement or award will receive less money. This is because California is one of the few jurisdictions which allows the payment of "straight" referral fees to attorneys who provide little or no service. This practice has been widely criticized and is likely to be affected by § 6146's provisions.

On its face, one cannot conclude that § 6146 provides inadequate reward for the attorney prosecuting a contingent fee case, with its inherent risk. For example, § 6146 allows fees as follows:

Amount of Settlement Or Judgement	Amount of Attorneys' Fees
$ 100,000	$ 36,667
$ 250,000	$ 66,667
$ 500,000	$ 91,667
$1,000,000	$141,667

It is difficult to conclude that counsel was inadequately compensated in this case. Plaintiff Joseph Roa was born on May 7, 1977. In 1979, approximately one year after the complaint was filed, the insurer for Dr. Roget and Lodi Medical Group agreed to pay policy limits, $500,000, $495,000 being allocated to the minor's claim. The attorneys who are the real parties in interest herein assert that they engaged in substantial preparation and settlement negotiations, but it does appear they they achieved settlement, for policy limits, without taking a single deposition, after serving a single set of interrogatories. The fee allowed by the court, and by § 6146, is $90,794.89.

Appellants' Arguments Are Contradicted By Experience

Certainly this case does not demonstrate that § 6146 discourages competent counsel from taking these cases. The matter was

undertaken with full knowledge that § 6146 was applicable, and that court approval of counsel's fee would be required, as in all minor's claims. In the nearly ten years since § 6146 was enacted, a decrease in the frequency of claims against physicians and other health care providers was observed in the year 1976, contemporaneous with the crisis and legislative action. Thereafter, the frequency of claims rose at a rate which indicates that counsel have not been discouraged by the statutory limit on their fees. This case itself suggests that § 6146 offers rewards adequate to accept the risk.

Section 6146 may require that lawyers modify their behavior, but not to their clients' disadvantage. Indeed, the cases which injured plaintiffs would most want to settle are cases where injuries are particularly severe, but where liability is uncertain. The attorney may be particularly tempted to "take a flier" if the contingent fee resulting from a potential "blockbuster" recovery would substantially exceed the fee recoverable from a settlement which compromises the matter of liability.

Section 6146's Diversion Of Money To The Injured Patient Is Most Probably At The Expense Of Referring Attorneys, Which Is Sound Public Policy.

In "California's Medical Malpractice Crisis",[1] then-Assemblyman Keene, MICRA's principal author, noted that 46% of the premium dollar was associated with legal expenses, 20% was attributable to administrative costs, and "only 34%, at most of the premium dollar was received by the plaintiff as direct compensation for injuries suffered". One of MICRA's purposes, and particularly the purpose of § 6146, was to transfer some portion of the amount being spent on legal expenses to the injured patient. The thrust of appellants' main argument is that the limit on attorneys fees may deny patients access to counsel, on the supposition that personal injury lawyers no longer will accept malpractice cases because the legislature has limited their fees. There is no evidence

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[1] Keene, California's Medical Malpractice Crisis," *A Legislator's Guide To the Medical Malpractice Issue* (1976) Health Policy Center, Georgetown University and the National Conference of State Legislators.

in the record supporting this contention. It is controverted by facts in this case, where counsel was engaged without binding agreement and with full knowledge of § 6146, in a matter in which the court would have to approve the fee. However, it is not true that § 6146 requires a reduction in the compensation received by the attorney who handles a medical malpractice case. This is because California is one of the few jurisdictions which permits the payment of "straight" referral fees (the others are Massachusetts, Maine, and Texas). The discussion titled "*Referral Fees: Everybody does it, but is it O.K.?*" in ABA Journal, February, 1985, p. 40, includes criticism of the straight referral fee by the Chairman of the ABA Special Committee on Implementation of the Model Rules of Professional Conduct. The counter argument advanced against the ABA approach (American Bar Association Code of Professional Responsibility Disciplinary Rule 2-107) is that it is unenforceable and sure to be ignored. California, in fact, abandoned the ABA approach for this reason in 1979. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, 182 Cal.Rptr. 519, the court grapples with California's attitude toward the referral fee, including the 1979 change. *Moran,* interestingly, also involved a fee attributable to the settlement of a minor's claim in a medical malpractice action, before MICRA. Concluding that "straight" referral fees were prohibited only between November 1972 and January 1, 1979, the court observes (921):

> The practice of forwarding fees among lawyers, part of our legal culture (see *Turner v. Donovan* (1935) 3 Cal.App.2d 485, 486-478 [39 P.2d 858]), remains with us even though the detrimental effect upon the client appears obvious. 'In an area where recovery in tort is founded primarily upon socialization of the loss occasioned by injury to person and property [citation], the society which bears that loss must be protected against arrangements which prevent the recovery from reaching the party injured, reduced only by necessary legal fees and other expenses of litigation. The pure referral fee, which compensates one lawyer with a percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement while the lawyer to whom the case is referred performs the work, is far from necessary to the injured person's recovery. To the extent that

the referral fee is paid for that purpose, loss has not been socialized. Rather, the obtaining of business by a lawyer who, by his own motion, has conceded his inability to handle it has been subsidized.' (*Dunne & Gaston v. Keltner* (1975) 50 Cal.App.3d 560, 566-567 [123 Cal.Rptr. 430] (conc. opn. of Thompson, J.).) The honoring of a referral fee is even more puzzling where the referring attorney is merely heeding the Rules of Professional Conduct in rejecting a case which he does not have the requisite skill or experience to handle competently. (See rule 6-101; *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414-415 [158 Cal.Rptr. 714]; see also *Lewis v. State Bar* (1981) 28 Cal.3d 683, 689-691 [170 Cal.Rptr. 634, 621 P.2d 258] (conc. opn. of Bird, C.J.).)

Regardless of the logic of this argument, there is another point of view. If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields. (See discussion in Morgan & Rotunda, Problems and Materials on Professional Responsibility (2d ed. 1981) pp. 261-263.)

Whether one argument is better than the other is unimportant. What is important is to recognize there are differing points of view on this subject and those points of view may well have influenced the Legislature, the Supreme Court and the State Bar to refrain from prohibiting referral fee contracts prior to 1972. Presumably, these institutions, each structurally geared to respond to its constituents or the public, acted in response to articulated perceptions.

Perhaps sadly but certainly realistically, California agrees with the author of the counter-argument in the ABA Journal article, *supra*. Prohibiting payment of referral fees doesn't work. "Straight" referral fees apparently will be paid so long as the pot

of money available for the attorneys is so large as to warrant sharing with counsel who is not competent to represent the injured patient. Section 6146 provides reasonable compensation to the attorney who is able to represent that client. It will probably affect marketplace forces, a salutory result. Unless the court is prepared to view the plaintiff's bar in the worst possible light, there is no reason to assume that injured patients will not be able to secure representation if referring attorneys who do no work no longer share to the same degree in monies paid to compensate the patient. More likely, referral will be made on the same basis as occurs routinely in medical practice, where referrals are made to appropriate specialists without expectation or acceptance of referral fees. Recoveries by clients will be significantly increased without equivalent reduction in the income of the attorneys who actually handle their cases.

Dietz, Baird & Berul addressed referral fees in their study "The Medical Malpractice Legal System", contained in the Appendix to the Report of the Secretary's Commission on Medical Malpractice, DHEW, January 16, 1973, p. 87, 115. In their study, they surveyed attorneys with a significant practice in the representation of plaintiffs in medical malpractice cases.

During the period January 1, 1970 through September, 1972 these attorneys received a mean hourly fee of $84, which was reduced to $63 when referring attorneys were paid a one-third referral fee. Assuming that counsel in the case before this court paid a similar referral fee, the following arithmetic has some pertinence:

Fee sought by appellants' attorney	$120,810
Less 33% referral fee	$ 40,270
Balance to attorney.....	$ 80,530
Section 6146 Fee	$ 90,794

Appellants' effort to characterize § 6146 as a restriction upon injured patients who are litigants disguises an obdurate insistence that these attorneys cannot be regulated in matters affecting their fees, even where it is clear that such regulation may benefit those injured patients. Section 6146 may indeed require changes in the approach previously taken by the plaintiffs' bar toward the division of settlements and awards. The fact that some patients will

keep a larger share is likely to produce a change in referral fee practices. Section 6146 has changed what *Moran*, *supra*, describes as the "commercial milieu" of the practice. However, the elimination of payments to attorneys who do no work does not seem vulnerable to the constitutional attacks asserted here.

Defense attorneys are certainly not given any undue advantage by the application of § 6146. These attorneys, incidentally, are compensated at a significantly lower rate than the plaintiffs' lawyers surveyed, even taking into account the time plaintiffs' attorneys spend on cases which are lost. The study by Dietz et al., *supra*, found a mean hourly fee of $47 and a median fee of $50 paid to defense attorneys in medical malpractice cases, compared to the $63 mean effective hourly fee received by plaintiffs' attorneys after reduction for referral fees paid and taking into account their "losers" as well as their "winners". In large part, this is because insurance company claims managers provide an effective restraint on the amount defense attorneys may charge, and the services which defense attorneys may provide. If the claims manager is tempted to authorize tactics which are designed to wear down plaintiffs' counsel, albeit at some expense to the insurer, the penalties attached to such a practice are so severe as to dispel the temptation. The fact that counsel are subject to sanctions and professional discipline (California Rules of Professional Conduct 2-110) is an obvious deterrent, but the possibility that the carrier allowing such a practice will be liable to the plaintiff for damages, including punitive damages for bad faith or for engaging in an unfair business practice (Insurance Code § 790.03) should be more intimidating.*

CONCLUSION

Appellants present their appeal in "patients' rights" language, arguing that the young Roa was injured because his attorney could not receive more of the child's settlement. The facts of the

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* The California State Bar is already moving to eliminate abuses in discovery. The State Bar's Commission on Discovery is proposing major limitations and reforms as the subject of legislation next year: Los Angeles Daily Journal, August 28, 1985, p.1.

case, and the amount of money which was paid to that attorney, weigh heavily against this contention. The fact is that the real parties in interest are the attorneys who want larger fees than those allowed by § 6146. The threatened refusal to abandon these cases in favor of more lucrative work is unsupported by any facts, or even by realistic expectation. That has not been the case in ten years since the enactment of § 6146. Attorneys handling these cases need not receive less. They are unlikely to pay the referral fees which have been paid in the past, in these new economic circumstances. The relationship of referral fees to the application of § 6146 should not be ignored, because it further demonstrates that § 6146 involves the regulation of the practice of law. Appellant's claim is that their practice, and particularly their fees, cannot be regulated. The arguments which are made for this proposition, in the guise of arguments for the patient, have no substance.

The judgment of the California Supreme Court should be summarily affirmed, or, alternatively, the appeal should be dismissed.

Dated: September 9, 1985

Respectfully submitted,

HASSARD, BONNINGTON,
ROGERS & HUBER
DAVID E. WILLETT

By:_____

Attorneys for Amicus Curiae
California Medical Association